absence of any evidence to the contrary, that any steps against the plaintiffs were in the contemplation of the Commissioner.

In all the circumstances I would allow the appeal to the extent that I would reduce the amount of the damages awarded to $5,000. There should be a consequential variation of the order for costs which should be that the plaintiffs should have their costs down to the date of payment into Court and the defendants should have their costs thereafter, such costs to be taxed with mutual set-off and the money to remain in Court pending taxation and the balance, if any, to be applied in the first instance to the payment of the plaintiffs' damages, any balance to be paid out to the defendant company.

The appellants should have the costs of this appeal.

Hill and **Good JJ.A.** concurred.

Appeal allowed in part.

Solicitors: *Donaldson & Burkinshaw; Bannon & Bailey.*

THE PERAK IRON MINING CO. LTD. v. CHONG VOON KIM

[C.A. (Thomson C.J., Hill and Good JJ.A.) May 17, 1962]

[Ipoh — F.M. Civil Appeal No. 39 of 1961]

Contract — Constructive agreement — Claim for "repair charges and goods supplied" — Contracts (Malay States) Ordinance, 1950, s.71.

Practice and Procedure — O.14 r.1.

This was an appeal against the decision of Azmi J. who gave summary judgment in favour of the respondent on a claim for $16,956.40 for "repair charges and goods supplied" which the appellants did not deny. Their only defence was that there was no contractual relationship between the parties and that they had never requested the respondent to do the work or to provide the goods.

Held: in view of section 71 of the Contracts (Malay States) Ordinance, 1950 the pleadings of the appellants had not shown that they had any defence and the trial judge was right in entering summary judgment for the respondent.

Principles to be applied in relation to O.14 clarified in *Jacobs* v. *Booth's Distillery Co.* (10) adopted.

Cases referred to:—

(1) *Lloyd's Banking Co.* v. *Ogle* (1875-6) 1 Ex. Div. 262.
(2) *Saw* v. *Hakin* (1888) 5 T.L.R. 72.
(3) *Lindsay* v. *Martin* (1888-89) 5 T.L.R. 322.
(4) *Ironclad Gold Mining Co.* v. *Gardner* (1887) 4 T.L.R. 18.
(5) *Ray* v. *Barker* (1879) 4 Ex. Div. 279.
(6) *Electric & General Contract Corpn.* v. *Thomson-Houston Electric Co.* (1893) 10 T.L.R. 103.
(7) *Carnegie* v. *Conner* (1889) 6 T.L.R. 12.
(8) *Jones* v. *Stone* [1894] A.C. 122.
(9) *Thompson* v. *Marshall* (1879) 41 L.T. (N.S.) 720.
(10) *Jacobs* v. *Booth's Distillery Company* (1901) 85 L.T. 262.
(11) *Thorne* v. *Seel* [1878] W.N. 215, C.A.

COURT OF APPEAL.

Ng Ek Tiong for the appellants.

Abdul Rahim Noor for the respondent.

Cur. Adv. Vult.

Thomson C.J.: I have had the advantage of reading the judgment of Mr. Justice Hill with which I agree.

I would only add the observation that the plaintiff's claim as endorsed on the Writ was for "repair charges and goods supplied". It was not for work done for the defendant "at his request" and "for goods sold and delivered". It is thus clear that the claim was not based on any express or implied agreement to pay, but on what might be described as a constructive agreement arising from the terms of section 71 of the Contracts (Malay States) Ordinance, 1950, which as is observed in *Pollock and Mulla's* book on the *Indian Contract Act* (8th Edition), page 424 "goes far beyond English law".

To this claim no defence was pleaded, although a defence was pleaded to a claim which was not made, that is a claim based on an express or implied agreement to pay. This may have been done through inadvertence but it is to be noted that no attempt has been made by the defendant at any time to amend his pleading.

Hill J.A.: Cases referred to *Lloyd's Banking Co.* v. *Ogle* (1), *Saw* v. *Hakin* (2), *Lindsay* v. *Martin* (3), *Ironclad Gold Mining Co.* v. *Gardner* (4), *Ray* v. *Barker* (5), *Electric & General Contract Corpn.* v. *Thomson-Houston Electric Co.* (6), *Carnegie* v. *Conner* (7), *Jones* v. *Stone* (8), *Thompson* v. *Marshall* (9).

This appeal is concerned with an application by the plaintiff/respondent under Order 14 rule 1 in the High Court at Ipoh for liberty to sign final judgment against the defendant/appellant.

The plaintiff's claim was for the sum of $16,956.40 for repair charges and goods supplied. The defendant did not deny that the repair work had been performed and the goods supplied, but stated that there was no contractual relationship between the parties and that the defendant had never requested the plaintiff to do the work or to provide the goods.

Azmi J. who heard the application, held that the defendant company had failed to show that they had a good defence to the action on the merits or that the facts disclosed would entitle them to defend the action generally and he gave summary judgment in favour of the plaintiff. In view of section 71 of the Contracts (Malay States) Ordinance, 1950, I do not consider that on the pleadings the defendant company had shewn that it had any defence and I respectfully agree with the view held by Azmi J.

Section 71 reads as follows:—

"71. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Certain principles to be applied in relation to Order 14 have been laid down in the cases listed at the head of this judgment. They appear in the notes to Order 14 in the White Book, 1961.

These principles appear to have been summarised and finally clarified by the House of Lords in *Jacobs* v. *Booth's Distillery Company* [10]. It was there laid down that:

"The proper view to be taken of Order XIV is that the tribunal to which the application is made should simply determine, 'Is there a triable issue to go before a jury or a court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'You have no defence'."

In my view it was a correct application of these principles in the light of section 71 to enter summary judgment for the plaintiff.

The defendant company was insured with the Peoples Insurance Company of Singapore and it appears from the record that there was some arrangement between the parties and the Insurance Company for the latter to pay for repairs, etc., done by the plaintiff to the defendant company's lorries. The correspondence shews that when certain bills were rendered to the Insurance Company by the plaintiff payment was refused on the ground that no report of any accident had been made by the defendant company. Much was made of this by defendant's counsel before Azmi J. but whatever the contractual position may be between the defendant and the Insurance Company, I cannot see how it can affect the liability of the defendant company to pay the plaintiff for work done, etc., under section 71 of the Contracts Ordinance.

The only case which I have been able to find that gives any assistance on this aspect of the matter is *Thorne* v. *Seel* [11]. The report is short and I set it out in full.

"*Rules of Court, 1875, Order XIV — Leave to defend — Claim of Defendants to be indemnified by Third Party.*

Appeal of the defendant from the decision of Mellor and Field JJ.

The Common Pleas Division had ordered that plaintiff should be at liberty to sign judgment upon a contract pursuant to Order XIV. It appeared upon the affidavits that the only defence suggested was, that the defendant ought to have been indemnified by one Gascoyne against the plaintiff's claim.

Sydney Wolfe, for the defendant, in support of the appeal.

Kenneth E. Digby, for the plaintiff, was not called upon to argue.

The Court (Bramwell, Brett, and Cotton L.JJ.) dismissed the appeal.

Bramwell L.J. said that although the powers conferred by Order XIV, ought to be used cautiously, in the present case the affidavits disclosed no defence.

Brett L.J. said that the defendant ought not to be allowed to defend, unless he could prove that Gascoyne had actually discharged the plaintiff's claim by payment. The defendant had not sworn to any facts entitling him to defend, nor even to any hearsay evidence from which an inference could be drawn in his favour; he had not shewn any plausible ground of defence.

Cotton L.J. said that the defendant had not deposed to statements upon hearsay, which, if proved by proper evidence at the trial, might entitle him to judgment there was no probable or plausible ground for defences. The only ground suggested was the existence of a cross-claim by the defendant against Gascoyne; but as the plaintiff had a valid claim, the defendant ought not to be assisted by the Court."

It would therefore appear that the defendant's remedy lies against the Peoples Insurance Company.

There is one final aspect of this matter with which it is necessary to deal. There had been two bites at this cherry, Azmi J. having struck out on technical grounds a previous application by the plaintiff.

When the matter came before the learned judge for the second time the excessiveness of the bills was raised by the defence. Azmi J. stated that "it was obvious that this point was added in the new affidavit and I regarded this with grave suspicion." The learned judge's view may indeed be the right one, but in the interval between hearings the defence could have had the time to go into the accounts in detail and the point may have been genuinely taken, I think therefore that they should be given the opportunity to be heard on this question.

Except therefore on the question of the excessiveness of the bills, which I think should be referred back to the learned trial judge, I would dismiss this appeal. As the respondent has succeeded on the main issue I think he should have the costs of this appeal and that the deposit should be paid out to him.

Good J.A.: I have had the benefit of reading the judgments of the learned Chief Justice and Mr. Justice Hill with which I agree. I too would dismiss the appeal and make the same order as to costs.

Appeal dismissed.

Solicitors: *Braddell & Ramani; Maxwell, Kenion, Cowdy & Jones.*

JAG SINGH v. TOONG FONG OMNIBUS CO. LTD.

[C.A. (Thomson C.J., Hill and Good JJ.A.) May 17, 1962]

[K.L. — F.M. Civil Appeal No. 45 of 1961]

Damages — Personal injury — School boy — Loss of leg — Contributory negligence — Costs — Whether can be apportioned.

Practice and Procedure — Costs — Contributory negligence — Apportionment — Observation on discretion.

The plaintiff, a schoolboy of 7 years, was knocked down and injured by the defendant's double decker omnibus as a result of which his right leg had to be amputated. He claimed that the accident was due to the negligent driving of the bus driver and sued for general and special damages. Suffian J. held that the bus driver was negligent but that there was contributory negligence on the part of the plaintiff which he assessed at 50%. He thus awarded the plaintiff $7,890 as general and special damages and half his taxed costs. The plaintiff now appealed against the finding of the trial judge of contributory negligence, the amount of general damages and against the order depriving him of half his costs.